

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

In the Matter of the Petition of )  
 )  
 HAWAIIAN ELECTRIC COMPANY, INC. )  
 )  
 For a Declaratory Order Declaring )  
 That Hawaiian Electric's Bifurcation )  
 For Further Consideration of the )  
 Two Non-Conforming Large Wind Farm )  
 Proposals from the Conforming )  
 Proposal That Were Submitted Through )  
 A Competitive Bidding Process in )  
 Docket No. 2007-0331 Was Proper. )  
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DOCKET NO. 2009-0327

ORDER DENYING HECO'S REQUEST AND DIRECTING  
HECO TO SUBMIT A DRAFT RFP PURSUANT TO FRAMEWORK

FILED

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PUBLIC UTILITIES  
COMMISSION

In the Matter of the Petition of  
HAWAIIAN ELECTRIC COMPANY, INC.  
For a Declaratory Order Declaring  
That Hawaiian Electric's Bifurcation  
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Two Non-Conforming Large Wind Farm  
Proposals from the Conforming  
Proposal That Were Submitted Through  
A Competitive Bidding Process in  
Docket No. 2007-0331 Was Proper.

<sup>2</sup>The Framework was adopted by the commission in Decision and Order No. 23121, filed on December 8, 2006, in Docket No. 03-0372.

I.

Summary

After a review of the Big Wind term sheet submitted by HECO, the commission finds that Castle and Cooke ("C&C") has complied with the original waiver and may proceed with its negotiations with HECO for a 200 megawatt ("MW") wind farm on Lanai. However, it should be noted that this is not a commission approval of the C&C project. C&C and HECO must still seek approval from the commission for their negotiated power purchase agreement and, if applicable, the community benefit agreements. The project must also complete the required environmental review and seek land-use and other various permitting approvals for the project to move forward.

The waiver no longer applies for the Molokai portion of the Big Wind project, because HECO did not submit a term sheet for a project with First Wind Hawaii, LLC ("FWH") on that island. The commission also finds that C&C cannot assign part of its development rights to Pattern Energy to develop 200MW of wind power on Molokai, because the original waiver did not allow for an assignment nor did C&C ever contemplate building a wind project on Molokai or FWH on Lanai.

The commission does see value in a multi-island solution to help the State meet the renewable energy portfolio standards that are required by law. The commission also sees the benefit of a diversity of projects which reduce the risks associated with a single generation facility or single resource. To that end, the commission believes that it is in the public

interest to allow greater geographical and resource diversity into the bidding process. Therefore, the commission orders that within three months of this order, HECO shall submit a draft RFP for the commission's consideration for a competitive bidding process for 200 MW or more of renewable energy to be delivered to or on the island of Oahu. The renewable energy projects submitted in this future RFP may be sited on any island that can be reasonably reached via an inter-island cable or sited on the island of Oahu itself.

## II.

### Background

On May 19, 2008, HECO submitted its Proposed Final RFP for Non-Firm Renewable Energy Projects, Island of Oahu ("Final Oahu RFP") to the commission.<sup>3</sup> The Final Oahu RFP solicited proposals for renewable energy contracts between 5 MW and 100 MW ("conforming bids"), but contained a clause that allowed bidders to submit alternate proposals ("non-conforming bids") for consideration.<sup>4</sup> The commission approved the issuance of the Final Oahu RFP by letter dated June 18, 2008 in Docket No. 2007-0331. In September 2008, HECO received a non-conforming bid from C&C for a 400 MW wind farm to be sited on the island of

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<sup>3</sup>See Letter from HECO to the commission transmitting the Proposed Final RFP, dated May 19, 2008, filed in Docket No. 2007-0331; Assignment Request at 1.

<sup>4</sup>See Proposed Final RFP, dated May 19, 2008, filed in Docket No. 2007-0331, para. 2.7 at 11.

Lanai.<sup>5</sup> HECO also received non-conforming bids from FWH for construction of a 50 MW wind farm as well as a 350 MW wind farm on Molokai, with the projects to be known as "Ikaika Wind Power."<sup>6</sup>

On October 20, 2008, HECO signed the Hawaii Clean Energy Initiative ("HCEI") Agreement. The HCEI Agreement provided that HECO and its subsidiaries, Hawaii Electric Light Company, Inc., and Maui Electric Company, Limited, would continue to negotiate with developers of currently proposed projects (identified in the HCEI Agreement) to integrate approximately 1,100 MW from a variety of renewable energy sources, including solar, biomass, wind, ocean thermal energy conversion, wave, and others. As a substantial part of this 1,100 MW goal, HECO committed to integrate (with the assistance of the State to accelerate the commitment) up to 400 MW of wind power into the Oahu electrical system that is produced by one or more wind farms located on Lanai and/or Molokai and transmitted to Oahu via undersea cable systems.<sup>7</sup>

On December 31, 2008, HECO, C&C, and FWH executed an agreement seeking to bifurcate the C&C and FWH wind farm proposals from the Final Oahu RFP ("Bifurcation Agreement").<sup>8</sup>

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<sup>5</sup>See Assignment Request at 1.

<sup>6</sup>Id.

<sup>7</sup>See Assignment Request, at 1-2.

<sup>8</sup>A copy of the Bifurcation Agreement was submitted to the commission by letter filed March 16, 2009 in Docket No. 2007-0331. The Bifurcation Agreement was filed under confidential seal, pursuant to Protective Order No. 23875, filed on December 6, 2007 in the same docket.

Under the Bifurcation Agreement, the three stipulating parties agreed that HECO would seek commission approval for C&C and FWH to transfer their September 2008 project proposals, as submitted in response to the Final Oahu RFP, into a separate negotiation and evaluation process for the Lanai/Molokai Wind projects led by HECO and supported by the State.

On November 16, 2009, in Docket No. 2009-0327, HECO filed a Petition with the commission seeking a Declaratory Order that HECO's bifurcation of C&C's and FWH's non-conforming proposals from the Final Oahu RFP was proper. On November 18, 2010, the commission issued its decision and order in Docket No. 2009-0327 ("Waiver D&O"), declaring that the proposed large wind farm projects, as described in HECO's petition filed on November 16, 2009, were not properly submitted through the Competitive Bidding Framework. However, the commission found that, in light of the public interest and to achieve a stated governmental objective, HECO was entitled to a waiver from the Competitive Bidding Framework, provided that: (1) fully executed term sheets for each of the Lanai/Molokai Wind Farm projects, were filed within four months from the date of the Decision and Order, unless otherwise ordered by the commission, and (2) documentation supporting the fairness of the price negotiated between HECO and the independent power producers was included in any application for approval of a PPA.<sup>9</sup>

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<sup>9</sup>See Waiver D&O, filed November 18, 2010.

With respect to the first condition, the term sheet required agreement on all material terms, which includes: (1) information on the scope of the project (i.e., technology, capacity, location); (2) the manner in which the energy will be delivered (i.e., as-available, scheduled); (3) the term of the agreement, projected in-service date, and key milestones, including, but not limited to proof of concept and any phases of the project; (4) performance standards; and (5) pricing.<sup>10</sup> On March 21, 2011, a fully executed term sheet between HECO and C&C was timely filed; however, no term sheet was executed between HECO and FWH due to FWH's inability to secure a suitable site for its proposed project.<sup>11</sup>

According to HECO, on March 25, 2011, the utility notified C&C that it had the option to develop a larger wind farm on Lanai, since a term sheet was not executed with FWH by the March 18, 2011 deadline.<sup>12</sup> The C&C term sheet included an option for it to assign a portion of its larger project development opportunity to a project developer on Molokai, subject to the commission's acceptance of this option, as well as the development of acceptable terms and conditions for a Molokai wind

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<sup>10</sup>Id.

<sup>11</sup>On March 17, 2011, FWH filed a letter with the commission requesting an extension of the deadline to file its term sheet. On April 28, 2011 the commission sent a letter to FWH stating that under the Rules of Practice and Procedure before the Public Utilities Commission, only a party to the docket can file a motion to extend in the docket, and that the proper procedure for filing such a request would have been to have HECO file a motion to extend prior to the expiration of the deadline.

<sup>12</sup>See Letter from HECO to the commission, dated April 14, 2011, at 1.

farm including pricing and community benefits.<sup>13</sup> By letter, dated April 7, 2011, C&C informed HECO that it has selected the "Second Option," which provides that C&C will develop a 200 MW wind farm on Lanai and has arranged for the development of a wind farm on Molokai, such that the capacity of the Lanai and Molokai Wind Farms total 400 MW.<sup>14</sup>

On May 23, 2011, HECO filed its Assignment Request Letter, seeking confirmation from the commission that it is acceptable for HECO to submit a supplemented term sheet for a power purchase agreement with C&C ("C&C Term Sheet"). On June 9, 2011, the Consumer Advocate filed its response letter as directed by the commission.<sup>15</sup>

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<sup>13</sup>Id. Under the C&C term sheet, if C&C elects the "Second Option" (as defined in the C&C term sheet), the developer of the Molokai wind farm shall propose comparable community benefits for Molokai and reach agreement on the community benefits and supplementation of the C&C term sheet to include similar terms and conditions for a power purchase agreement for the Molokai wind farm project within specified time frames provided in the C&C term sheet.

<sup>14</sup>Id. at 1-2. The April 7 letter includes (1) a copy of the executed letter of intent between C&C and Molokai Renewables LLC (an affiliate of Pattern Energy Group LP) relating to the transfer of C&C's rights to develop 200 MW of wind energy on Molokai and (2) a copy of the executed letter of intent between Molokai Renewables LLC and Molokai Properties Limited, evidencing site control on Molokai by Molokai Renewables for the project.

<sup>15</sup>See Letter from Consumer Advocate to commission, dated June 9, 2011 ("CA's Response"). On May 23, 2011, the commission directed the Consumer Advocate to file a response to HECO's Assignment Request.



### III.

#### HECO's Request

HECO seeks confirmation that it is acceptable to supplement the existing term sheet with C&C ("C&C Term Sheet") to reflect an assignment of a portion of the development rights associated with the Molokai portion of the Big Wind Project to a new party, namely Molokai Renewables, LLC. HECO contends that such an assignment would be consistent with the provisions of the C&C Term Sheet, Section XIII. According to HECO, a supplementation, and thus an assignment of development rights should be acceptable to the commission because 1) projects may be assigned and sites may be moved under certain conditions; and 2) consistent with established practice, the C&C Term Sheet provides a proper mechanism for C&C to develop a portion of its project on Molokai.<sup>16</sup>

According to HECO, it is "established practice that proposals, and even power purchase agreements in their entirety, may be assigned subject to those conditions for assignment as may be agreed to by the parties."<sup>17</sup> For example, HECO states that Shell WindEnergy Inc. assigned its rights to develop the Ulupalakua wind farm on Maui to a subsidiary of Sempra Energy.<sup>18</sup> In addition, HECO states that:

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<sup>16</sup>See Assignment Request, at 3-6.

<sup>17</sup>Id. at 3.

<sup>18</sup>See Docket No. 2011-0060.

[HECO] has in the past allowed a project developer to modify its project location, provided that (a) the alternate site is deemed acceptable from a technical integration standpoint, (b) there is evidence of site control for the alternate location, and (c) the relocation does not increase the costs to ratepayers.<sup>19</sup>

To that end, HECO contends that:

In the case of C&C and Molokai Renewables, the integration of 200 MW of wind power from the island of Molokai, along with 200 MW of wind power from the island of Lanai, was covered in the recently completed Oahu Wind Integration and Transmission Study done for the Big Wind projects. As discussed previously, Molokai Renewables has produced evidence of Molokai site control, and pricing for the 200 MW wind farm on Molokai would be no higher than that expressed in the C&C Term Sheet for a 200 MW wind farm on Lanai.<sup>20</sup>

With respect to the Assignment Request, HECO argues the following:

1. The fundamental terms and conditions covering the Molokai Renewables project - namely pricing, community benefits, and technical performance standards - will be no less stringent or less beneficial to customers compared to the C&C Term Sheet. Hawaiian Electric intends to negotiate with Molokai Renewables to secure pricing at least as favorable as the C&C Term Sheet. Hawaiian Electric will also negotiate an acceptable community benefits package with Molokai Renewables and incorporate it into the supplemental term sheet.
2. Relocating part of C&C's project on Molokai is consistent with [HECO's] past practice in that (a) revisions to the prior technical integration studies done for the project will not be required, (b) C&C (via Molokai Renewables), has been able to demonstrate site control for the project, and (c) pricing will be no less beneficial to ratepayers.

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<sup>19</sup>See Assignment Request, at 4.

<sup>20</sup>Id.

3. Relocating part of C&C's allocable MW on the island of Molokai will decrease the risks created by a single point of failure. As FWH points out in its letter to the commission dated March 17, 2011, by siting all of the MW allocable to C&C on Lanai: "[t]he State would have put itself in a situation where there is a single point of failure - the Lanai wind farm. If Castle & Cooke is unsuccessful, then all of the efforts of the Big Wind project would be lost. That leaves the entire Big Wind project's success depending on a successfully developed Lanai wind farm."

4. Supplementation of the C&C Term Sheet is consistent with the underlying purpose for the waiver and is in the public's interest. In determining that the waiver of the Frameworks set forth in the PUC D&O was in the public interest, the commission stated: "[r]equiring the Big Wind bids to be competitively bid under a new RFP at this juncture would add considerable delay to the process and may perhaps endanger the viability of the project." Supplementation of the C&C Term Sheet is consistent with the underlying purpose for the waiver and is in the public's interest, by ensuring that the Big Wind project remains viable by permitting C&C to expeditiously develop on the islands of Lanai and Molokai all 400 MW of the total energy C&C originally proposed.

5. The terms and conditions, including price, of any power purchase agreement for a wind farm on Molokai must still be approved by the commission. Under the PUC Waiver D&O, any power purchase agreement with C&C and/or Molokai Renewables must be approved by the commission. Moreover, the PUC D&O requires that any application to the commission for approval must include "documentation supporting the fairness of the price negotiated between HECO and the independent power producers . . . ." <sup>21</sup>

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<sup>21</sup>Id. at 6-7.

#### IV.

##### Consumer Advocate's Position

On June 9, 2011, the Consumer Advocate filed its Response regarding HECO's Assignment Request. In its Response, the Consumer Advocate states that, subject to recommendations and reservations, it "supports an additional waiver from the competitive bidding framework for a supplemental term sheet that would allow for the development of two 200 MW wind farms on the islands of Lanai with C&C as the developer and Molokai with Molokai Renewables LLC as the developer, respectively."<sup>22</sup>

That said, the Consumer Advocate states that it "disagrees with some of the arguments raised by HECO in support of its request." In particular, the Consumer Advocate notes that that the "situations noted by HECO in which the projects may be assigned differ from the instant request."<sup>23</sup> For example, the Consumer Advocate contends that the developer of the Ulupalakua project assigned its rights to another developer, however "[i]n the instant request, it does not appear that C&C had sought the rights to develop any project on Molokai and the commission's [Waiver D&O] did not grant C&C any such rights."<sup>24</sup> The Consumer Advocate contends that the commission's Waiver D&O granted HECO a waiver to contract with C&C for the development of a renewable energy project on the island of Lanai only.

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<sup>22</sup>See CA's Response, at 4.

<sup>23</sup>Id.

<sup>24</sup>Id.

According to the Consumer Advocate,

On March 21, 2011, HECO timely filed the term sheet associated with the C&C project on Lanai. As such, as set forth in the PUC Waiver D&O, the Consumer Advocate observes that C&C has approval to develop a wind farm on Lanai only. Furthermore, it was FWH that was granted the right to develop a wind farm on Molokai in spite of the fact that FWH had no land rights on that island.

Thus, at face value, the proposed assignment of rights by C&C does not seem supported by a strict interpretation of the PUC Waiver D&O and certainly not by the Competitive Bidding Framework.<sup>25</sup>

Although the Consumer Advocate does not find support for HECO's Assignment Request in commission precedent, the Consumer Advocate contends that,

[I]t is in the best interests of the consumers and the state of Hawaii for the commission to grant an additional waiver that would allow HECO to supplement the term sheet to provide for a 200 MW wind farm on Lanai to be developed by C&C and a 200 MW wind farm on Molokai to be developed by Molokai Renewables LLC.<sup>26</sup>

The Consumer Advocate notes that while it "questions whether C&C owns the right to develop a 200 MW wind farm on Molokai that it could then assign, the Consumer Advocate contends that the commission has already established the justification for an additional waiver that would allow the possible development on Molokai."<sup>27</sup> Thus the Consumer Advocate predicates its support for

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<sup>25</sup>Id. at 5 (emphasis added).

<sup>26</sup>Id.

<sup>27</sup>Id. at 6. The Consumer Advocate quotes the commission in stating the following:

- The Big Wind projects provide a significant opportunity to achieve the government objectives

an additional waiver upon "its efforts to foster the State's goals of achieving energy independence by relying on indigenous renewable energy sources and energy efficiency measures."<sup>28</sup>

In addition, the Consumer Advocate argues that there may be "significant benefits associated with a 200 MW wind farm, such as a community benefits package, that should be made available to the island of Molokai," and that an assignment would also provide "the benefit of having two projects on separate islands that adds significant value to the cable investment as well as to the reliability of the energy that is expected from Big Wind projects."<sup>29</sup> The Consumer Advocate contends that "with only a 400 MW wind farm, there is essentially a single point of failure," and that "[h]aving two 200 MW wind farms reduces the risks associated with only one wind farm and also increases the likelihood that the investment in a cable will continue to be not only useful, but used in the event that one wind farm may be unavailable."<sup>30</sup>

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set out in the renewable portfolio standards ("RPS"); and

- The coordinated effort required to realize the benefits are significant and requiring the Big Wind projects to be processed under the Competitive Bidding Framework would add considerable delay to the process and might endanger the viability of the projects.

Id. See also Waiver D&O, at 18.

<sup>28</sup>Id.

<sup>29</sup>Id. at 7.

<sup>30</sup>Id.

V.

Discussion

A.

Assignment

Based on the docket record, it is clear that C&C and HECO have complied with the requirements set forth in the Waiver D&O. In particular, a fully executed term sheet between C&C and HECO was submitted by the deadline, including all the requisite information described by the commission. Therefore, it is the commission's view that the waiver granted to HECO and C&C vis-à-vis the Waiver D&O is still valid, despite FWH's failure to submit a fully executed term sheet. The commission believes that it would be inequitable at this juncture to forfeit C&C's portion of the waiver based on FWH's failure. On the other hand, the commission determines that FWH's failure to submit a fully executed term sheet by the deadline set forth in the Waiver D&O invalidates the waiver granted to HECO and FWH with respect to the Molokai portion of the project.

With respect to HECO's Assignment Request, the commission has reservations regarding C&C's proposed assignment of FWH's "defaulted" development rights to a new project developer. As noted by the Consumer Advocate, the C&C Term Sheet contemplated the development of renewable energy on the island of Lanai only, and made no mention of developing its own renewable energy project on the island of Molokai. Although project developers have assigned their development rights to new parties in previous dockets, the commission does not believe that it is

appropriate to allow the assignment of development rights garnered through the commission's waiver from the Framework. In addition, the commission notes that the "default mechanism" within the bifurcation agreement was created by contract between HECO, C&C, and FWH, and was never submitted to the commission for approval.<sup>31</sup>

Furthermore, the commission, in granting its Waiver D&O never contemplated C&C developing a renewable project on Molokai, and vice versa for FWH on Lanai. The commission's Waiver D&O was granted with respect to the specific facts and circumstances presented to it at the time of the Petition, and was not intended to be a conceptual endorsement of the Big Wind Project irrespective of the details, parties, and participants. In other words, the assignment of development rights by C&C to a new developer on the island of Molokai is outside of the scope contemplated by the commission, and runs contrary to the spirit of the Waiver D&O. Based on the foregoing, HECO's request for confirmation that it is acceptable to supplement the term sheet described herein is denied.

B.

Re-bid

Given the size and scope of the proposed project, the commission must make several key decisions that impact the utility's ratepayers as well as the residents of each island. In

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<sup>31</sup>The so called "default mechanism" was set forth in the bifurcation agreement, and essentially states that if one of the developers fails, the other would get most or all of the total project, i.e., 400MW of renewable energy.



doing so, the commission must strike a balance between the need for a predictable regulatory process and the interests of vested stakeholders. Therefore, in light of the ruling set forth above, the commission determines that it is in the public's best interest to require the "Molokai portion" of the Big Wind Project to be subject to a new competitive bidding process.<sup>32</sup> As illustrated by the Consumer Advocate, the commission sees value in a two-island solution, as it increases diversity and reduces project-on-project risk associated with a single generation facility. To that end, the commission believes that it is also in the public interest to allow greater geographical and resource diversity into the bidding process, which may ultimately benefit the ratepayer through the results of the bidding process.

It should be noted that by requiring a new RFP, the commission does not intend to favor particular energy resources or geographical locations over another. Instead, the commission seeks to encourage a greater number of renewable developers to enter into the process. Based on the foregoing, the commission hereby directs HECO to submit to the commission a new RFP according to the Framework for Competitive Bidding. The new RFP shall be for a minimum of 200 MW of renewable energy to be

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<sup>32</sup>In the Waiver D&O, the commission justified granting a waiver, in part, on the fact that a new competitive bid process could cause delay to the process and might endanger the viability of the projects. However, due to the fact that the commission has rendered FWH's portion of the project invalid, the viability of the project is no longer at issue.

delivered to the island of Oahu.<sup>33</sup> As stated in the Waiver D&O, the commission wishes to stress that such findings are not meant to illustrate an endorsement of the inter-island renewable energy project, nor has it made a substantive determination of the project's viability. The commission reserves the right to revisit any and all aspects of a project's viability when HECO makes its formal Application for approval of any power purchase agreement.

HECO should seek to shorten the re-bid RFP process through use of bidding guidelines, terms, requirements, or information included in the Final RFP approved by the commission in Docket No. 2007-0331, to the extent possible, and shall submit a draft RFP for the commission's consideration not later than three months from the date of this decision and order.

## VI.

### Orders

#### THE COMMISSION ORDERS:

1. The waiver granted to HECO and C&C vis-à-vis the Waiver D&O is valid.
2. The waiver granted to FWH in the Waiver D&O is invalid.
3. HECO's Assignment Request is denied.
4. HECO is directed to submit a draft RFP for a minimum of 200 MW of renewable energy for delivery to the island of Oahu,

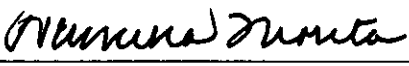
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<sup>33</sup>In other words, the renewable energy project(s) could be sited on any island that can be reasonably reached via an inter-island cable or sited on the island of Oahu itself.

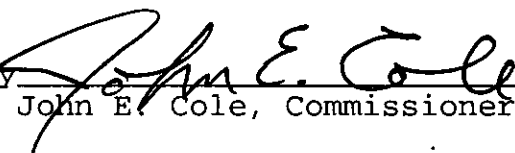
according to the Competitive Bidding Framework, subject to the terms and conditions set forth herein, and not later than three months from the date of this decision and order.

DONE at Honolulu, Hawaii JUL 14 2011.

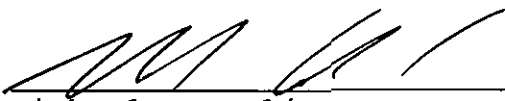
PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

By   
Hermina Morita, Chair

By   
Carlito P. Caliboso, Commissioner

By   
John E. Cole, Commissioner

APPROVED AS TO FORM:

  
Michael M. Colón  
Commission Counsel

2009-0327.cp

CERTIFICATE OF SERVICE

The foregoing order was served on the date of filing by mail, postage prepaid, and properly addressed to the following parties:

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